

OFFICIAL FILE
ILLINOIS COMMERCE COMMISSION

ORIGINAL

ILLINOIS
COMMERCE COMMISSION

JUL 3 10 48 AM '00

(File Original and 3 copies)

Docket No. CHIEF CLERK'S OFFICE
ICC Office Use Only

Please provide the appropriate information in the () areas in the heading below.

eVulkan, Inc. d/b/a beMANY! :
: Application for a certificate of :
local and interexchange authority :
to operate as a reseller of telecommunications :
services throughout the entire :
State of Illinois. :

00-0482

ORIGINAL

**APPLICATION FOR CERTIFICATE TO BECOME A
TELECOMMUNICATIONS CARRIER**
(Use additional sheets as necessary.)

GENERAL

1. Applicant's Name(including d/b/a, if any)

FEIN # 23-3009155

eVulkan, Inc. d/b/a beMANY!

Address: Street 100 Broadway, 21st Floor

City New York State/Zip NY 10271

2. Authority Requested: (Mark all that apply) 13-403 X 13-404 13-405

3. Request for waivers/variances: In applications for exchange service authority under Sections 13-404 or 13-405, waivers of Part 710 and of Section 735.180 of Part 735 are generally requested. In applications for interexchange service authority under Sections 13-403 and 13-404, waivers of Part 710 and Part 735 are generally requested. Please indicate which waivers Applicant is requesting.

X Part 710 X Part 735 X Section 735.180 Other

4. In what area of the state does the Applicant propose to provide service?

Applicant seeks statewide authority.

5. Please attach a sheet designating contact persons to work with Staff on the following:

PLEASE SEE EXHIBIT 1.

- a) issues related to processing this application
- b) consumer issues
- c) customer complaint resolution
- d) technical and service quality issues
- e) "tariff" and pricing issues
- f) 9-1-1 issues
- g) security/law enforcement

Please identify each contact person's (i) name, (ii) title, (iii) mailing address, (iv) telephone number, (v) facsimile number, and (vi) e-mail address, if any.

6. Please check type of organization?

☐ Individual ☒ Corporation
☐ Partnership Date corporation was formed July 9, 1999
☐ Other (Specify) In what state? Delaware

7. Submit a copy of articles of incorporation and a copy of certificate of authority to transact business in Illinois.

PLEASE SEE EXHIBIT 2.

8. List jurisdictions in which Applicant is offering service(s).

Applicant is not currently providing services.

9. Has the Applicant, or any principal in Applicant, been denied a Certificate of Service or had its certification revoked or suspended in any jurisdiction in this or another name?

☐ YES (Please provide details) ☒ NO

10. Have there been any complaints against the Applicant in any other jurisdiction?

☐ YES ☒ NO

If YES, describe fully. _____

11. Will the Applicant keep its books and records in Illinois? ☐ YES ☒ NO

If NO, permission pursuant to 83 Ill. Adm Code Part 250 needs to be requested.

Applicant respectfully requests permission to keep its books outside the State of Illinois under 83 Administrative Code, Chapter I, Subchapter b, chapter a: Part 250, Public Utility Books and Accounts. If authorized by the Commission, Applicant will maintain its books in New York, New York.

MANAGERIAL

12. Please attach evidence of the applicant's managerial and technical resources and ability to provide service. This may be in either narrative form, resumes of key personnel, or a combination of these forms.

PLEASE SEE EXHIBIT 3.

13. List officers of Applicant.

George Jankovic, President & CEO

William Robinson, Senior VP of Marketing

Mircea Mihaescu, VP and Chief Technology Officer

14. Does any officer of Applicant have an ownership or other interest in any other entity which has provided or is currently providing telecommunications services? ☐ YES ☒ NO

If YES, list entity. _____

15. How will Applicant bill for its service(s)? **Applicant will bill end users directly.**

16. How does Applicant propose to handle service, billing, and repair complaints?

Applicant maintains its own Customer Service Department which is responsible for handling service complaints and inquiries. Applicant's Customer Service may be contacted toll-free by calling (877) 289-7401. Subscribers to Applicant's service offerings may also reach Customer Service by writing: eVulkan, Inc., 100 Broadway, 21st Floor, New York, NY 10271. Customer Service representatives are available twenty-four (24) hours per day, three hundred and sixty-five (365) days per year.

17. Will personnel be available at Applicant's business office during regular working hours to respond to inquiries about service or billing? ☒ YES ☐ NO

18. What telephone number(s) would a customer use to contact your company?

(877) 239-7401

19. What are your procedures to prevent unauthorized "slamming" of customers?

Applicant's internal policies for ensuring that new customers affirmatively select the Applicant as the customer's designated local exchange carrier, confirm paperwork and provide continuing training and supervision of sales agents are as follows. Applicant maintains procedures pursuant to which local exchange carrier change orders are confirmed in one of two ways: (i) through a written letter of authorization ("LOA") obtained from a customer authorizing Applicant to submit a local exchange carrier change order in accordance with the requirements of Section 64.1100(a) of the Rules of the Federal Communications Commission, 47 C.F.R. § 64.1100(a); or (2) through verification of the customer's desire to initiate a local service change order by an appropriately qualified and independent third party operating in a location physically separate from the telemarketing representative which has obtained the customer's oral authorization to submit the local service change order in accordance with the provisions of Section 64.1100(c) of the Rules of the Federal Communications Commission, 47 C.F.R. § 64.1100(c).

20. If granted authority to operate as a local exchange carrier, will the applicant abide by the following 83 Illinois Administrative Code Parts: 705, 710, 720, 725, 735, 755, 756, 757, 770, and 772?

 X YES NO (If no, please provide an explanation.)

21. Will the applicant sign and return membership forms to the Universal Telephone Assistance Corporation and the Illinois Telecommunications Access Corporation? X YES NO

FINANCIAL

22. Please attach evidence of applicant's financial fitness through the submission of its most current income statement and balance sheet, or other appropriate documentation of applicant's financial resources and ability to provide service.

PLEASE SEE EXHIBIT 4.

TECHNICAL

23. Does Applicant utilize its own equipment and/or facilities? YES X NO

If YES, please list:

If NO, which facility provider(s)'s services does Applicant use?

Americom Communications

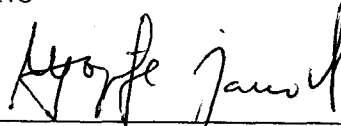
24. Please describe the nature of service to be provided (e.g., operator services, internet, debit cards, long distance service, local service).

Applicant seeks authority to provide resold local and long distance telecommunications services.

25. Will technical personnel be available at all times to assist customers with service problems?

X YES NO

26. If Applicant intends to provide payphone service, will the equipment utilized comply with FCC requirements and Finding (9) of the Commission Order entered in Docket No. 84-0442 on June 11, 1986, including, but not limited to: (a) touch dialing; (b) access to 9-1-1 and "0" operator dialing without use of a coin; (c) rules governing use of payphones by disabled persons; (d) ability to complete local and long-distance calls; (e) unlimited duration for local calls; and (f) a message explaining the telephone's general operations, dialing instructions for emergency assistance, payphone owner's name, method of reporting service problems and method of receiving credit for faulty calls? X YES NO



(Signature of Applicant)
George Jankovic
President and Chief Executive
Officer

VERIFICATION

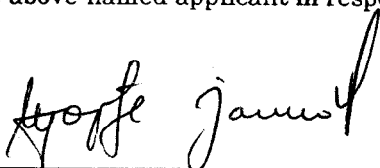
This application shall be verified under oath.

OATH

State of New York)
)ss
County of New York)

George Jankovic makes oath and says that he is President and Chief Executive
(Insert here the name of affiant) (Insert the official title of the affiant)
Officer
of eVulkan, Inc., doing business as beMANY!
(Insert here the exact legal title or name of the Applicant)

that he has examined the foregoing application and that to the best of his knowledge, information, and belief, all statements of fact contained in the said application are true, and the said application is a correct statement of the business and affairs of the above-named applicant in respect to each and every matter set forth therein.


(Signature of affiant)
George Jankovic

Subscribed and sworn to before me, a Notary Public/ _____
(Title of person authorized to administer oaths)

in the State and County above named, this 10 day of August, 192004.

My Commission Expires July 14, 2004



(Signature of person authorized to administer oath)

EXHIBIT 1

**CONTACT PERSONS
OF
EVULKAN, INC.**

Contact Persons

a. Issues related to processing of this Application;

Catherine M. Hannan, Esq.
Hunter Communications Law Group, PC
1620 I Street, NW, Suite 701
Washington, DC 20006
Telephone Number: (202) 293-2500
Facsimile Number: (202) 293-2571
E-Mail: huntlaw@erols.com

b. Consumer issues;

c. Customer complaint resolution;

d. Technical and service quality issues;

e. "tariff" and pricing issues;

f. 9-1-1 issues; and

g. Security/law enforcement:

George Jankovic, President and Chief Executive Officer
eVulkan, Inc.
100 Broadway, 21st Floor
New York, NY 10271
Telephone Number: (212) 732-1170
Facsimile Number: (212) 406-4884

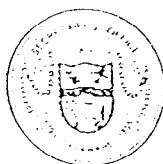
EXHIBIT 2

**ARTICLES OF INCORPORATION
AND
CERTIFICATE OF AUTHORITY
OF
EVULKAN, INC.**

Office of the Secretary of State

I, EDWARD J. FREEL, SECRETARY OF STATE OF THE STATE OF DELAWARE, DO HEREBY CERTIFY THE ATTACHED IS A TRUE AND CORRECT COPY OF THE RESTATED CERTIFICATE OF "EVULKAN, INC.", FILED IN THIS OFFICE ON THE NINTH DAY OF FEBRUARY, A.D. 2000, AT 4:15 O'CLOCK P.M.

A FILED COPY OF THIS CERTIFICATE HAS BEEN FORWARDED TO THE KENT COUNTY RECORDER OF DEEDS.



A handwritten signature in cursive script, reading "Edward J. Freel", is written over a horizontal line.

Edward J. Freel, Secretary of State

3067722 8100

001066889

AUTHENTICATION: 0249733

DATE: 02-10-00

RESTATED CERTIFICATE OF INCORPORATION
OF
eVulkan, Inc.

Djordje Jankovic hereby certifies that:

ONE: The date of filing the original Certificate of Incorporation of this corporation with the Secretary of State of the State of Delaware was July 9, 1999.

TWO: He is the duly elected and acting President of eVulkan, Inc., a Delaware corporation.

THREE: The Certificate of Incorporation of this corporation is hereby amended and restated to read as follows:

I.

The name of the corporation is EVULKAN, INC. (the "Corporation" or the "Company").

II.

The address of the registered office of the Corporation in the State of Delaware is 15 East North Street, City of Dover, County of Kent.

The name of the Corporation's registered agent at said address is United Corporate Services, Inc.

III.

The purpose of the Corporation is to engage in any lawful act or activity for which a corporation may be organized under the General Corporation Law of the State of Delaware.

IV.

A. This Corporation is authorized to issue two classes of stock to be designated, respectively, "Common Stock" and "Preferred Stock." The total number of shares which the Corporation is authorized to issue is 30,500,000 shares, 23,000,000 shares of which shall be Common Stock (the "Common Stock") and 7,500,000 shares of which shall be Preferred Stock (the "Preferred Stock"). The Preferred Stock shall have a par value of \$0.001 per share and the Common Stock shall have a par value of \$0.001 per share.

B. The number of authorized shares of Common Stock may be increased or decreased (but not below the number of shares of Common Stock then outstanding) by the affirmative vote of the holders of a majority of the stock of the Corporation (voting together on an as-if-converted basis).

C. All of the authorized shares of Preferred Stock are hereby designated "Series A Preferred Stock" (the "Series Preferred").

D. The rights, preferences, privileges, restrictions and other matters relating to the Series Preferred are as follows:

1. DIVIDEND RIGHTS.

(a) Holders of Series Preferred, in preference to the holders of any other stock of the Company ("Junior Stock"), shall be entitled to receive, when and as declared by the Board of Directors, but only out of funds that are legally available therefor, cash dividends at the rate of 8% of the Original Issue Price (as defined below) per annum on each outstanding share of Series Preferred (as adjusted for any stock dividends, combinations, splits, recapitalizations and the like with respect to such shares). The "Original Issue Price" of the Series Preferred shall be \$1.85. Such dividends shall be payable only when, as and if declared by the Board of Directors and shall be non-cumulative.

(b) So long as any shares of Series Preferred shall be outstanding, no dividend, whether in cash or property, shall be paid or declared, nor shall any other distribution be made, on any Junior Stock, nor shall any shares of any Junior Stock of the Company be purchased, redeemed or otherwise acquired for value by the Company (except for acquisitions of Common Stock by the Company pursuant to agreements which permit the Company to repurchase such shares upon termination of services to the Company or in exercise of the Company's right of first refusal upon a proposed transfer) until all dividends (set forth in Section 1(a) above) on the Series Preferred shall have been paid or declared and set apart. In the event dividends are paid on any share of Common Stock, an additional dividend shall be paid with respect to all outstanding shares of Series Preferred in an amount equal per share (on an as-if-converted to Common Stock basis) to the amount paid or set aside for each share of Common Stock. The provisions of this Section 1(b) shall not, however, apply to (i) a dividend payable in Common Stock, (ii) the acquisition of shares of any Junior Stock in exchange for shares of any other Junior Stock or (iii) any repurchase of any outstanding securities of the Company that is approved by the Company's Board of Directors.

2. VOTING RIGHTS.

(a) General Rights. Except as otherwise provided herein or as required by law, the Series Preferred shall be voted equally with the shares of the Common Stock of the Company and not as a separate class, at any annual or special meeting of stockholders of the Company, and may act by written consent in the same manner as the Common Stock, in either case upon the following basis: each holder of shares of Series Preferred shall be entitled to such number of votes as shall be equal to the whole number of shares of Common Stock into which such holder's aggregate number of shares of Series Preferred are convertible (pursuant to Section 4 hereof) immediately after the close of business on the record date fixed for such meeting or the effective date of such written consent.

(b) **Separate Vote of Series Preferred.** For so long as any shares of Series Preferred remain outstanding, in addition to any other vote or consent required herein or by law, the vote or written consent of the holders of at least a majority of the outstanding Series Preferred shall be necessary for effecting or validating the following actions:

(i) Any amendment, alteration, repeal or waiver of any provision of the Certificate of Incorporation or the Bylaws of the Company (including any filing of a Certificate of Designation) that alters or changes the voting or other powers, preferences or other special rights, privileges or restrictions of the Series Preferred;

(ii) Any increase or decrease in the authorized number of shares of Common Stock or Preferred Stock or Series Preferred;

(iii) Any authorization or any designation, whether by reclassification or otherwise, of any new class or series of stock or any other securities convertible into equity securities of the Company ranking on a parity with or senior to the Series Preferred in right of redemption, liquidation preference, voting or dividends or any increase in the authorized or designated number of any such new class or series;

(iv) Any redemption, repurchase, payment of dividends or other distributions with respect to Junior Stock (except for acquisitions of Common Stock by the Company pursuant to agreements which permit the Company to repurchase such shares upon termination of services to the Company or in exercise of the Company's right of first refusal upon a proposed transfer);

(v) Any agreement by the Company or its stockholders regarding an Asset Transfer or Acquisition (each as defined in Section 3(c));

(vi) Any action that results in the payment or declaration of a dividend on any shares of Common Stock or Preferred Stock;

(vii) Any voluntary dissolution or liquidation of the Company;

(viii) Any increase or decrease in the authorized number of members of the Company's Board of Directors; or

(iv) Any incurrence of debt in excess of \$250,000.

(c) **Election of Board of Directors.** For so long as at least 2,000,000 shares of Series Preferred remain outstanding (subject to adjustment for any stock split, reverse stock split or similar event affecting the Series Preferred) (i) the holders of Series Preferred, voting as a separate class, shall be entitled to elect two members of the Company's Board of Directors at each meeting or pursuant to each consent of the Company's stockholders for the election of directors, and to remove from office such directors and to fill any vacancy caused by the resignation, death or removal of such directors; (ii) the holders of Common Stock, voting as a separate class, shall be entitled to elect two members of the Board of Directors at each meeting or

pursuant to each consent of the Company's stockholders for the election of directors, and to remove from office such directors and to fill any vacancy caused by the resignation, death or removal of such directors; and (iii) the holders of Common Stock and Series Preferred, voting together as a single class on an as-if-converted basis, shall be entitled to elect all remaining members of the Board of Directors at each meeting or pursuant to each consent of the Company's stockholders for the election of directors, and to remove from office such directors and to fill any vacancy caused by the resignation, death or removal of such directors.

3. LIQUIDATION RIGHTS.

(a) Upon any liquidation, dissolution, or winding up of the Company, whether voluntary or involuntary, before any distribution or payment shall be made to the holders of any Junior Stock, the holders of Series Preferred shall be entitled to be paid out of the assets of the Company an amount per share of Series Preferred equal to the Original Issue Price plus any declared but unpaid dividends on the Series Preferred (as adjusted for any stock dividends, combinations, splits, recapitalizations and the like with respect to such shares) for each share of Series Preferred held by them. If, upon any such liquidation, distribution or winding up, the assets of the Company shall be insufficient to make payment in full to all holders of Series Preferred of the liquidation preferences set forth in this Section 3(a), then such assets shall be distributed among the holders of Series Preferred at the time outstanding, ratably in proportion to the full amounts to which they would otherwise be respectively entitled.

(b) After the payment of the full liquidation preference of the Series Preferred as set forth in Section 3(a) above, the assets of the Company legally available for distribution, if any, shall be distributed ratably to the holders of the Common Stock and Series Preferred on an as-if-converted to Common Stock basis until such time as the holders of Series Preferred have received pursuant to Section 3(a) above and this Section 3(b) an aggregate amount per share of Series Preferred equal to five times the Original Issue Price (as adjusted for any stock dividends, combinations, splits, recapitalizations and the like with respect to such shares) plus any declared but unpaid dividends on the Series Preferred; thereafter, the remaining assets of the Company legally available for distribution, if any, shall be distributed ratably to the holders of the Common Stock.

(c) The following events shall be considered a liquidation under this Section:

(i) any consolidation or merger of the Company with or into any other corporation or other entity or person, or any other corporate reorganization, in which the stockholders of the Company immediately prior to such consolidation, merger or reorganization own less than 50% of the Company's voting power immediately after such consolidation, merger or reorganization, or any transaction or series of related transactions to which the Company is a party in which in excess of 50% of the Company's voting power is transferred, excluding any consolidation or merger effected exclusively to change the domicile of the Company (an "Acquisition"); or

(ii) a sale, lease or other disposition of all or substantially all of the assets of the Company (an "Asset Transfer").

(iii) In any of such events, if the consideration received by this corporation is other than cash, its value will be deemed its fair market value as determined in good faith by the Board of Directors. Any securities shall be valued as follows:

(A) Securities not subject to investment letter or other similar restrictions on free marketability covered by (B) below:

(1) If traded on a securities exchange or through the Nasdaq National Market, the value shall be deemed to be the average of the closing prices of the securities on such quotation system over the 30 day period ending three days prior to the closing;

(2) If actively traded over-the-counter, the value shall be deemed to be the average of the closing bid or ask prices (whichever is applicable) over the 30 day period ending three days prior to the closing; and

(3) If there is no active public market, the value shall be the fair market value thereof, as determined by the Board of Directors (including the consent of all directors designated by the Series Preferred).

(B) The method of valuation of securities subject to investment letter or other restrictions on free marketability (other than restrictions arising solely by virtue of a shareholder's status as an affiliate or former affiliate) shall be to make an appropriate discount from the market value determined as above in (A) (1), (2) or (3) to reflect the approximate fair market value thereof, as determined by the Board of Directors (including the consent of all directors designated by the Series Preferred).

4. CONVERSION RIGHTS.

The holders of the Series Preferred shall have the following rights with respect to the conversion of the Series Preferred into shares of Common Stock (the "Conversion Rights"):

(a) Optional Conversion. Subject to and in compliance with the provisions of this Section 4, any shares of Series Preferred may, at the option of the holder, be converted at any time into fully-paid and nonassessable shares of Common Stock. The number of shares of Common Stock to which a holder of Series Preferred shall be entitled upon conversion shall be the product obtained by multiplying the "Series Preferred Conversion Rate" then in effect (determined as provided in Section 4(h)) by the number of shares of Series Preferred being converted.

(h) Series Preferred Conversion Rate. The conversion rate in effect at any time for conversion of the Series Preferred (the "Series Preferred Conversion Rate") shall

be the quotient obtained by dividing the Original Issue Price of the Series Preferred by the "Series Preferred Conversion Price," calculated as provided in Section 4(c).

(c) **Series Preferred Conversion Price.** The conversion price for the Series Preferred shall initially be the Original Issue Price of the Series Preferred (the "Series Preferred Conversion Price"). Such initial Series Preferred Conversion Price shall be adjusted from time to time in accordance with this Section 4. All references to the Series Preferred Conversion Price herein shall mean the Series Preferred Conversion Price as so adjusted."

(d) **Mechanics of Conversion.** Each holder of Series Preferred who desires to convert the same into shares of Common Stock pursuant to this Section 4 shall surrender the certificate or certificates therefor, duly endorsed, at the office of the Company or any transfer agent for the Series Preferred, and shall give written notice to the Company at such office that such holder elects to convert the same. Such notice shall state the number of shares of Series Preferred being converted. Thereupon, the Company shall promptly issue and deliver at such office to such holder a certificate or certificates for the number of shares of Common Stock to which such holder is entitled and shall promptly pay (i) in cash or, to the extent sufficient funds are not then legally available therefor, in Common Stock (at the Common Stock's fair market value determined by the Board of Directors as of the date of such conversion), any declared and unpaid dividends on the shares of Series Preferred being converted and (ii) in cash (at the Common Stock's fair market value determined by the Board of Directors as of the date of conversion) the value of any fractional share of Common Stock otherwise issuable to any holder of Series Preferred. Such conversion shall be deemed to have been made at the close of business on the date of such surrender of the certificates representing the shares of Series Preferred to be converted, and the person entitled to receive the shares of Common Stock issuable upon such conversion shall be treated for all purposes as the record holder of such shares of Common Stock on such date.

(e) **Adjustment for Stock Splits and Combinations.** If the Company shall at any time or from time to time after the date that the first share of Series Preferred is issued (the "Original Issue Date") effect a subdivision of the outstanding Common Stock without a corresponding subdivision of the Preferred Stock, the Series Preferred Conversion Price in effect immediately before that subdivision shall be proportionately decreased. Conversely, if the Company shall at any time or from time to time after the Original Issue Date combine the outstanding shares of Common Stock into a smaller number of shares without a corresponding combination of the Preferred Stock, the Series Preferred Conversion Price in effect immediately before the combination shall be proportionately increased. Any adjustment under this Section 4(e) shall become effective at the close of business on the date the subdivision or combination becomes effective.

(f) **Adjustment for Common Stock Dividends and Distributions.** If the Company at any time or from time to time after the Original Issue Date makes, or fixes a record date for the determination of holders of Common Stock entitled to receive, a dividend or other distribution payable in additional shares of Common Stock, in each such event the Series Preferred Conversion Price that is then in effect shall be decreased as of the time of such issuance

or, in the event such record date is fixed, as of the close of business on such record date, by multiplying the Series Preferred Conversion Price then in effect by a fraction (i) the numerator of which is the total number of shares of Common Stock issued and outstanding immediately prior to the time of such issuance or the close of business on such record date and (ii) the denominator of which is the total number of shares of Common Stock issued and outstanding immediately prior to the time of such issuance or the close of business on such record date plus the number of shares of Common Stock issuable in payment of such dividend or distribution; provided, however, that if such record date is fixed and such dividend is not fully paid or if such distribution is not fully made on the date fixed therefor, the Series Preferred Conversion Price shall be recomputed accordingly as of the close of business on such record date and thereafter the Series Preferred Conversion Price shall be adjusted pursuant to this Section 4(f) to reflect the actual payment of such dividend or distribution.

(g) **Adjustment for Reclassification, Exchange and Substitution.** If at any time or from time to time after the Original Issue Date, the Common Stock issuable upon the conversion of the Series Preferred is changed into the same or a different number of shares of any class or classes of stock, whether by recapitalization, reclassification or otherwise (other than an Acquisition or Asset Transfer as defined in Section 3(c) or a subdivision or combination of shares or stock dividend or a reorganization, merger, consolidation or sale of assets provided for elsewhere in this Section 4), in any such event each holder of Series Preferred shall have the right thereafter to convert such stock into the kind and amount of stock and other securities and property receivable upon such recapitalization, reclassification or other change by holders of the maximum number of shares of Common Stock into which such shares of Series Preferred could have been converted immediately prior to such recapitalization, reclassification or change, all subject to further adjustment as provided herein or with respect to such other securities or property by the terms thereof.

(h) **Reorganizations, Mergers or Consolidations.** If at any time or from time to time after the Original Issue Date, there is a capital reorganization of the Common Stock or the merger or consolidation of the Company with or into another corporation or another entity or person (other than an Acquisition or Asset Transfer as defined in Section 3(c) or a recapitalization, subdivision, combination, reclassification, exchange or substitution of shares provided for elsewhere in this Section 4), as a part of such capital reorganization, provision shall be made so that the holders of the Series Preferred shall thereafter be entitled to receive upon conversion of the Series Preferred the number of shares of stock or other securities or property of the Company to which a holder of the number of shares of Common Stock deliverable upon conversion would have been entitled on such capital reorganization, subject to adjustment in respect of such stock or securities by the terms thereof. In any such case, appropriate adjustment shall be made in the application of the provisions of this Section 4 with respect to the rights of the holders of Series Preferred after the capital reorganization to the end that the provisions of this Section 4 (including adjustment of the Series Preferred Conversion Price then in effect and the number of shares issuable upon conversion of the Series Preferred) shall be applicable after that event and be as nearly equivalent as practicable.

(i) Sale of Shares Below Series Preferred Conversion Price.

(i) If at any time or from time to time after the Original Issue Date, the Company issues or sells, or is deemed by the express provisions of this subsection (i) to have issued or sold, Additional Shares of Common Stock (as defined in subsection (i)(iv) below), other than as a dividend or other distribution on any class of stock as provided in Section 4(f) above, and other than a subdivision or combination of shares of Common Stock as provided in Section 4(e) above, for an Effective Price (as defined in subsection (i)(iv) below) less than the then effective Series Preferred Conversion Price, then and in each such case the then existing Series Preferred Conversion Price shall be reduced, as of the opening of business on the date of such issue or sale, to a price determined by multiplying the Series Preferred Conversion Price by a fraction (i) the numerator of which shall be (A) the number of shares of Common Stock deemed outstanding (as defined below) immediately prior to such issue or sale, plus (B) the number of shares of Common Stock which the aggregate consideration received (as defined in subsection (i)(ii)) by the Company for the total number of Additional Shares of Common Stock so issued would purchase at such Series Preferred Conversion Price, and (ii) the denominator of which shall be the number of shares of Common Stock deemed outstanding (as defined below) immediately prior to such issue or sale plus the total number of Additional Shares of Common Stock so issued. For the purposes of the preceding sentence, the number of shares of Common Stock deemed to be outstanding as of a given date shall be the sum of (A) the number of shares of Common Stock actually outstanding, (B) the number of shares of Common Stock into which the then outstanding shares of Series Preferred could be converted if fully converted on the day immediately preceding the given date and (C) the number of shares of Common Stock which could be obtained through the exercise or conversion of all other rights, options and convertible securities outstanding on the day immediately preceding the given date.

(ii) For the purpose of making any adjustment required under this Section 4(i), the consideration received by the Company for any issue or sale of securities shall (A) to the extent it consists of cash, be computed at the net amount of cash received by the Company after deduction of any underwriting or similar commissions, compensation or concessions paid or allowed by the Company in connection with such issue or sale but without deduction of any expenses payable by the Company, (B) to the extent it consists of property other than cash, be computed at the fair value of that property as determined in good faith by the Board of Directors and (C) if Additional Shares of Common Stock, Convertible Securities (as defined in subsection (i)(iii)) or rights or options to purchase either Additional Shares of Common Stock or Convertible Securities are issued or sold together with other stock or securities or other assets of the Company for a consideration which covers both, be computed as the portion of the consideration so received that may be reasonably determined in good faith by the Board of Directors to be allocable to such Additional Shares of Common Stock, Convertible Securities or rights or options.

(iii) For the purpose of the adjustment required under this Section 4(i), if the Company issues or sells (i) stock or other securities convertible into Additional Shares of Common Stock (such convertible stock or securities being herein referred to as "Convertible Securities") or (ii) rights or options for the purchase of Additional Shares of

Common Stock or Convertible Securities and if the Effective Price of such Additional Shares of Common Stock is less than the Series Preferred Conversion Price, in each case the Company shall be deemed to have issued at the time of the issuance of such rights or options or Convertible Securities the maximum number of Additional Shares of Common Stock issuable upon exercise or conversion thereof and to have received as consideration for the issuance of such shares an amount equal to the total amount of the consideration, if any, received by the Company for the issuance of such rights or options or Convertible Securities, plus, in the case of such rights or options, the minimum amounts of consideration, if any, payable to the Company upon the exercise of such rights or options, plus, in the case of Convertible Securities, the minimum amounts of consideration, if any, payable to the Company (other than by cancellation of liabilities or obligations evidenced by such Convertible Securities) upon the conversion thereof; *provided that* if in the case of Convertible Securities the minimum amounts of such consideration cannot be ascertained, but are a function of antidilution or similar protective clauses, the Company shall be deemed to have received the minimum amounts of consideration without reference to such clauses; *provided further* that if the minimum amount of consideration payable to the Company upon the exercise or conversion of rights, options or Convertible Securities is reduced over time or on the occurrence or non-occurrence of specified events other than by reason of antidilution adjustments, the Effective Price shall be recalculated using the figure to which such minimum amount of consideration is reduced; *provided further* that if the minimum amount of consideration payable to the Company upon the exercise or conversion of such rights, options or Convertible Securities is subsequently increased, the Effective Price shall be again recalculated using the increased minimum amount of consideration payable to the Company upon the exercise or conversion of such rights, options or Convertible Securities. No further adjustment of the Series Preferred Conversion Price, as adjusted upon the issuance of such rights, options or Convertible Securities, shall be made as a result of the actual issuance of Additional Shares of Common Stock on the exercise of any such rights or options or the conversion of any such Convertible Securities. If any such rights or options or the conversion privilege represented by any such Convertible Securities shall expire without having been exercised, the Series Preferred Conversion Price as adjusted upon the issuance of such rights, options or Convertible Securities shall be readjusted to the Series Preferred Conversion Price which would have been in effect had an adjustment been made on the basis that the only Additional Shares of Common Stock so issued were the Additional Shares of Common Stock, if any, actually issued or sold on the exercise of such rights or options or rights of conversion of such Convertible Securities, and such Additional Shares of Common Stock, if any, were issued or sold for the consideration actually received by the Company upon such exercise, plus the consideration, if any, actually received by the Company for the granting of all such rights or options, whether or not exercised, plus the consideration received for issuing or selling the Convertible Securities actually converted, plus the consideration, if any, actually received by the Company (other than by cancellation of liabilities or obligations evidenced by such Convertible Securities) on the conversion of such Convertible Securities, *provided that* such readjustment shall not apply to prior conversions of Series Preferred.

(iv) "Additional Shares of Common Stock" shall mean all shares of Common Stock issued by the Company or deemed to be issued pursuant to this Section 4(i), whether or not subsequently reacquired or retired by the Company, other than

(A) shares of Common Stock issued upon conversion of the Series Preferred; (B) up to 2,800,000 (or any greater number with the consent of the Board, including the consent of both directors designated by holders of the Series Preferred) shares of Common Stock and/or options, warrants or other Common Stock purchase rights, and the Common Stock issued pursuant to such options, warrants or other rights (as adjusted for any stock dividends, combinations, splits, recapitalizations and the like) after the Original Issue Date to employees, officers or directors of, or consultants or advisors to the Company or any subsidiary pursuant to stock purchase or stock option plans or other arrangements that are approved by the Board; (C) shares of Common Stock issued pursuant to the exercise of options, warrants or convertible securities outstanding as of the Original Issue Date, (D) shares of Common Stock and/or options, warrants or other Common Stock purchase rights, and the Common Stock issued pursuant to such options, warrants or other rights issued for consideration other than cash pursuant to a merger, consolidation, acquisition or similar business combination approved by the Board and the holders of two-thirds of the Series Preferred and (E) shares of Common Stock issued pursuant to any equipment leasing arrangement or debt financing from a bank or similar financial institution, or any other transaction, if approved by the Board and the holders of two-thirds of the Series Preferred. References to Common Stock in the subsections of this clause (iv) above shall mean all shares of Common Stock issued by the Company or deemed to be issued pursuant to this Section 4(i). The "Effective Price" of Additional Shares of Common Stock shall mean the quotient determined by dividing the total number of Additional Shares of Common Stock issued or sold, or deemed to have been issued or sold by the Company under this Section 4(i), into the aggregate consideration received, or deemed to have been received by the Company for such issue under this Section 4(i), for such Additional Shares of Common Stock.

(j) **Certificate of Adjustment.** In each case of an adjustment or readjustment of the Series Preferred Conversion Price for the number of shares of Common Stock or other securities issuable upon conversion of the Series Preferred, if the Series Preferred is then convertible pursuant to this Section 4, the Company, at its expense, shall compute such adjustment or readjustment in accordance with the provisions hereof and prepare a certificate showing such adjustment or readjustment, and shall mail such certificate, by first class mail, postage prepaid, to each registered holder of Series Preferred at the holder's address as shown in the Company's books. The certificate shall set forth such adjustment or readjustment, showing in detail the facts upon which such adjustment or readjustment is based, including a statement of (i) the consideration received or deemed to be received by the Company for any Additional Shares of Common Stock issued or sold or deemed to have been issued or sold, (ii) the Series Preferred Conversion Price at the time in effect, (iii) the number of Additional Shares of Common Stock and (iv) the type and amount, if any, of other property which at the time would be received upon conversion of the Series Preferred.

(k) **Notices of Record Date.** Upon (i) any taking by the Company of a record of the holders of any class of securities for the purpose of determining the holders thereof who are entitled to receive any dividend or other distribution or (ii) any Acquisition (as defined in Section 3(c)) or other capital reorganization of the Company, any reclassification or recapitalization of the capital stock of the Company, any merger or consolidation of the Company with or into any other corporation, or any Asset Transfer (as defined in Section 3(c)),

or any voluntary or involuntary dissolution, liquidation or winding up of the Company, the Company shall mail to each holder of Series Preferred at least 10 days prior to the record date specified therein (or such shorter period approved by a majority of the outstanding Series Preferred) a notice specifying (A) the date on which any such record is to be taken for the purpose of such dividend or distribution and a description of such dividend or distribution, (B) the date on which any such Acquisition, reorganization, reclassification, transfer, consolidation, merger, Asset Transfer, dissolution, liquidation or winding up is expected to become effective and (C) the date, if any, that is to be fixed as to when the holders of record of Common Stock (or other securities) shall be entitled to exchange their shares of Common Stock (or other securities) for securities or other property deliverable upon such Acquisition, reorganization, reclassification, transfer, consolidation, merger, Asset Transfer, dissolution, liquidation or winding up.

(l) Automatic Conversion.

(i) Each share of Series Preferred shall automatically be converted into shares of Common Stock, based on the then-effective Series Preferred Conversion Price, (A) at any time upon the affirmative election of the holders of at least a majority of the outstanding shares of the Series Preferred or (B) immediately upon the closing of a firmly underwritten public offering pursuant to an effective registration statement under the Securities Act of 1933, as amended, covering the offer and sale of Common Stock for the account of the Company in which (i) the per share price is at least five times the Original Issue Price (as adjusted for stock splits, dividends, recapitalizations and the like) and (ii) the gross cash proceeds to the Company (before underwriting discounts, commissions and fees) are at least \$25,000,000. Upon such automatic conversion, any declared and unpaid dividends shall be paid in accordance with the provisions of Section 4(d).

(ii) Upon the occurrence of either of the events specified in Section 4(l)(i) above, the outstanding shares of Series Preferred shall be converted automatically without any further action by the holders of such shares and whether or not the certificates representing such shares are surrendered to the Company or its transfer agent; provided, however, that the Company shall not be obligated to issue certificates evidencing the shares of Common Stock issuable upon such conversion unless the certificates evidencing such shares of Series Preferred are either delivered to the Company or its transfer agent as provided below, or the holder notifies the Company or its transfer agent that such certificates have been lost, stolen or destroyed and executes an agreement satisfactory to the Company to indemnify the Company from any loss incurred by it in connection with such certificates. Upon the occurrence of such automatic conversion of the Series Preferred, the holders of Series Preferred shall surrender the certificates representing such shares at the office of the Company or any transfer agent for the Series Preferred. Thereupon, there shall be issued and delivered to each holder promptly at such office and in its name as shown on such surrendered certificate or certificates, a certificate or certificates for the number of shares of Common Stock into which the shares of Series Preferred surrendered were convertible on the date on which such automatic conversion occurred, and any declared and unpaid dividends shall be paid in accordance with the provisions of Section 4(d).

(m) **Fractional Shares.** No fractional shares of Common Stock shall be issued upon conversion of Series Preferred. All shares of Common Stock (including fractions thereof) issuable upon conversion of more than one share of Series Preferred by a holder thereof shall be aggregated for purposes of determining whether the conversion would result in the issuance of any fractional share. If, after the aforementioned aggregation, the conversion would result in the issuance of any fractional share, the Company shall, in lieu of issuing any fractional share, pay cash equal to the product of such fraction multiplied by the Common Stock's fair market value (as determined by the Board of Directors) on the date of conversion.

(n) **Reservation of Stock Issuable Upon Conversion.** The Company shall at all times reserve and keep available out of its authorized but unissued shares of Common Stock, solely for the purpose of effecting the conversion of the shares of the Series Preferred, such number of its shares of Common Stock as shall from time to time be sufficient to effect the conversion of all outstanding shares of the Series Preferred. If at any time the number of authorized but unissued shares of Common Stock shall not be sufficient to effect the conversion of all then outstanding shares of the Series Preferred, the Company will take such corporate action as may, in the opinion of its counsel, be necessary to increase its authorized but unissued shares of Common Stock to such number of shares as shall be sufficient for such purpose.

(o) **Notices.** Any notice required by the provisions of this Section 4 shall be in writing and shall be deemed effectively given: (i) upon personal delivery to the party to be notified, (ii) when sent by confirmed electronic mail or facsimile if sent during normal business hours of the recipient; if not, then on the next business day, (iii) five days after having been sent by registered or certified mail, return receipt requested, postage prepaid, or (iv) one day after deposit with a nationally recognized overnight courier, specifying next day delivery, with verification of receipt. All notices shall be addressed to each holder of record at the address of such holder appearing on the books of the Company.

(p) **Payment of Taxes.** The Company will pay all taxes (other than taxes based upon income) and other governmental charges that may be imposed with respect to the issue or delivery of shares of Common Stock upon conversion of shares of Series Preferred, excluding any tax or other charge imposed in connection with any transfer involved in the issue and delivery of shares of Common Stock in a name other than that in which the shares of Series Preferred so converted were registered.

(q) **No Dilution or Impairment.** Without the consent of the holders of then outstanding Series Preferred as required under Section 2(b), the Company shall not amend its Restated Certificate of Incorporation or participate in any reorganization, transfer of assets, consolidation, merger, dissolution, issue or sale of securities or take any other voluntary action, for the purpose of avoiding or seeking to avoid the observance or performance of any of the terms to be observed or performed hereunder by the Company, but shall at all times in good faith assist in carrying out all such action as may be reasonably necessary or appropriate in order to protect the conversion rights of the holders of the Series Preferred against dilution or other impairment.

5. REDEMPTION.

(a) The Company shall be obligated to redeem the Series Preferred as follows:

(i) The holders of at least a majority of the then outstanding shares of Series Preferred, voting together as a separate class, may require the Company, to the extent it may lawfully do so, to redeem the Series Preferred in three equal annual installments beginning on the fifth anniversary of the Original Issue Date, and ending on the date two years from such first redemption date (each a "Redemption Date"). The Company shall effect such redemptions on the applicable Redemption Date by paying in cash in exchange for the shares of Series Preferred to be redeemed a sum equal to the Original Issue Price per share of Series Preferred (as adjusted for any stock dividends, combinations, splits, recapitalizations and the like) plus declared and unpaid dividends with respect to such shares. The total amount to be paid for the Series Preferred is hereinafter referred to as the "Redemption Price." The number of shares of Series Preferred that the Company shall be required to redeem on any one Redemption Date shall be equal to the amount determined by dividing (A) the aggregate number of shares of Series Preferred outstanding immediately prior to the Redemption Date by (B) the number of remaining Redemption Dates (including the Redemption Date to which such calculation applies). Shares subject to redemption pursuant to this Section 5(a) shall be redeemed from each holder of Series Preferred on a pro rata basis.

(ii) At least 30 days but no more than 60 days prior to the first Redemption Date, the Company shall send a notice (a "Redemption Notice") to all holders of Series Preferred to be redeemed setting forth (A) the Redemption Price for the shares to be redeemed; and (B) the place at which such holders may obtain payment of the Redemption Price upon surrender of their share certificates. If the Company does not have sufficient funds legally available to redeem all shares to be redeemed at the Redemption Date, then it shall redeem such shares pro rata (based on the portion of the aggregate Redemption Price payable to them) to the extent possible and shall redeem the remaining shares to be redeemed as soon as sufficient funds are legally available.

(b) On or prior to the Redemption Date, the Company shall deposit the Redemption Price of all shares to be redeemed with a bank or trust company having aggregate capital and surplus in excess of \$100,000,000, as a trust fund, with irrevocable instructions and authority to the bank or trust company to pay, on and after such Redemption Date, the Redemption Price of the shares to their respective holders upon the surrender of their share certificates. Any moneys deposited by the Company pursuant to this Section 5(b) for the redemption of shares thereafter converted into shares of Common Stock pursuant to Section 4 hereof no later than the fifth day preceding the Redemption Date shall be returned to the Company forthwith upon such conversion. The balance of any funds deposited by the Company pursuant to this Section 5(b) remaining unclaimed at the expiration of one year following such Redemption Date shall be returned to the Company promptly upon its written request.